

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1226

To be argued by
FEDERICO E. VIRELLA, JR.

B
P/S

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 75-1226

UNITED STATES OF AMERICA,

Appellee,

—v.—

RICHARD ANGLADA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,

*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

FEDERICO E. VIRELLA, JR.,

T. BARRY KINGHAM,

*Assistant United States Attorneys,
Of Counsel.*

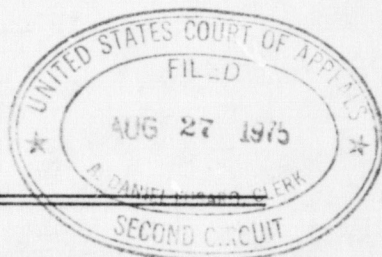


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	3
A. The Government's Case	3
B. The Defendants' Case	6
ARGUMENT:	fil
POINT I—The trial court properly refused to instruct the jury on the issue of entrapment	9
POINT II—The trial court correctly permitted the in- formant Santana to invoke his Fifth Amendment privilege	13
POINT III—The trial court properly instructed the jury regarding reasonable doubt	17
CONCLUSION	18

TABLE OF CASES

<i>Holland v. United States</i> , 348 U.S. 121 (1954)	17
<i>Kastigar v. United States</i> , 406 U.S. 441 (1972)	15
<i>United States v. Braver</i> , 450 F.2d 799 (2d Cir. 1971), <i>cert. denied</i> , 405 U.S. 1064 (1972)	11
<i>United States v. Chandler</i> , 380 F.2d 993 (2d Cir. 1967)	15
<i>United States v. Domenech</i> , 476 F.2d 1229 (2d Cir.), <i>cert. denied</i> , 414 U.S. 840 (1973)	14, 15
<i>United States v. Gonzalez</i> , 460 F.2d 1286 (2d Cir. 1973)	11

<i>United States v. Greenberg</i> , 441 F.2d 369 (2d Cir.), cert. denied, 404 U.S. 853 (1971)	11
<i>United States v. Heap</i> , 345 F.2d 170 (2d Cir. 1965)	17
<i>United States v. Henry</i> , 417 F.2d 267 (2d Cir. 1969), cert. denied, 397 U.S. 953 (1970)	11
<i>United States v. Indiviglio</i> , 352 F.2d 276 (2d Cir. 1965), cert. denied, 383 U.S. 907 (1966)	18
<i>United States v. Kadis</i> , 373 F.2d 370 (1st Cir. 1967)	10
<i>United States v. Llanes</i> , 398 F.2d 880 (2d Cir. 1968), cert. denied, 393 U.S. 1032 (1969)	15
<i>United States v. Miley</i> , 513 F.2d 1191 (2d Cir. 1975)..	11, 13
<i>United States v. Niercs</i> , 451 F.2d 836 (2d Cir. 1971)....	11
<i>United States v. Perez</i> , 426 F.2d 1073 (2d Cir. 1970), aff'd, 402 U.S. 146 (1971)	18
<i>United States v. Riley</i> , 363 F.2d 955 (2d Cir. 1966)..	10, 11
<i>United States v. Sherman</i> , 200 F.2d 880 (2d Cir. 1952)	10

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 75-1226

UNITED STATES OF AMERICA,

Appellee.

—v.—

RICHARD ANGLADA,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Richard Anglada appeals from a judgment of conviction entered on June 6, 1975, in the Southern District of New York, following a four-day trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Indictment 75 Cr. 43, filed on January 16, 1975, charged George Shaw, Edward Torres and Richard Anglada with conspiracy to distribute heroin and with the distribution of 27.66 grams of heroin on September 6, 1974, in violation of Title 21, United States Code, Sections 821, 841(a)(1), 841(b)(1)(A) and 846.

The trial commenced on March 24, 1975, and concluded on March 31, 1975 when the jury found the defendants

Anglada and Shaw guilty on both counts. Edward Torres was acquitted. At the time of conviction Shaw * was remanded, but Anglada was released pending appeal.

On April 1, 1975, a post-trial hearing began to determine whether Anglada should be remanded upon a motion made by the Government when it discovered that, while leaving the courtroom after his conviction, Anglada told members of his family that "I am going to kill that D.A." ** Anglada was remanded at the end of the first day of the hearing which resumed and ended on April 8, 1975.

On April 11, 1975, Judge Cannella filed a Memorandum and Order granting the Government's application to remand Anglada pending sentence and appeal. This Court affirmed the District Court's denial of bail pending sentence on April 22, 1975.

* On April 30, 1975, George Shaw received an indeterminate sentence of 0-6 years on Counts One and Two, to run concurrently, under the Youth Corrections Act, Title 18, United States Code, Section 5010(b)(c). Shaw has not appealed his conviction.

** The Court also heard testimony about two other threats. During the hearing Assistant United States Attorney Virella testified that Carlos Santana had informed him that prior to September 3, 1974, Anglada and Torres told him that "if anything happens to any of us (referring to Torres and Anglada) as a result of the upcoming sale that he [Santana] was going to have some trouble with them" (April 1, 1975; Tr. 25). Detective Drucker, who overheard the threat against the Assistant United States Attorney, testified that he was present at an interview when Maria Matos, sister of Carlos Santana and former girlfriend of Anglada, told the Assistant United States Attorney that "he [referring to Anglada] did threaten her brother [Santana] if anything would have happened to him [Anglada], but she thought that he [Anglada] was only kidding" (April 1, 1975; Tr. 21). According to Drucker's testimony, Matos told this to her mother who in turn communicated it to Santana.

On June 6, 1975, Anglada was sentenced to one to six years on Counts One and Two, sentences to run concurrently, under the Youth Corrections Act, Title 18, United States Code, Section 5010(b).

Anglada is currently serving his sentence.

Statement of Facts

A. The Government's Case

Detective Ralph Nieves, a member of the New York Joint Task Force, testified that on September 3, 1974, he was operating in New York City in an undercover capacity, posing as a purchaser of narcotics. He met that day with Carlos Santana, a confidential informant, in the vicinity of York Avenue and 92nd Street, in New York City. From there the two men drove to the Arecibo bodega, a grocery store located at 1786 Lexington Avenue in Manhattan to buy narcotics. At about 4:30 in the afternoon, Santana entered the bodega, and a few minutes later exited and returned to the car which was subsequently driven away by Nieves (Tr. 30-33, 138-139). Nieves and Santana returned to the same bodega an hour later. After a quick visit by Santana to the bodega (Tr. 34, 140), Santana brought Nieves inside and introduced him to Edward Torres who was working behind a meat counter. Nieves asked if he could see Torres the following day and Torres replied that West Houston and Bowery would be the meeting place. Nieves asked Torres how much it would cost him and Torres answered \$1,600. Nieves then told Torres that if he, Nieves, was not satisfied with the package it would be returned. Torres said it would be all right to return it to him. Nieves and Santana left the bodega after the conversation (Tr. 35, 39-40, 140-141).

On September 4, 1975, at approximately one o'clock in the afternoon, Nieves and Santana drove to the vicinity

of Bowery and West Houston Street where they waited. After an hour of waiting, Santana got out of the car and a short time later returned to the car, which Nieves then drove to a restaurant on Prince and Elizabeth Streets (Tr. 41-42, 143). There Santana made a telephone call and gave the telephone receiver to Nieves who had a conversation with Torres (Tr. 42-44). During the conversation Nieves asked Torres what the problem was and Torres responded that he had sent his cousin, Richie, (the defendant Anglada), to meet them since his connection was out of stuff and that as soon as they had something he, Torres, would contact Santana who in turn would contact Nieves (Tr. 45).

On September 6, 1974, Nieves and Santana returned to the area of Bowery and West Houston, Anglada appeared a half-hour later, entered the car and was introduced to Nieves by Santana (Tr. 46, 144). Nieves asked Anglada if everything was all right and Anglada said "yes" (Tr. 46). Anglada then directed Nieves to drive to Broadway and Canal, where the car was parked. Nieves entered a bar, the Doll Lounge, where a few minutes later he was met by Santana and Anglada who had gone first to a frankfurter stand (Tr. 47-49). In the bar, Nieves asked Anglada if the heroin was Eddie's (defendant Torres) stuff that he was buying and Anglada said "yes." Moreover, Anglada told Nieves that the "stuff" would take a five-hit (Tr. 48).^{*} Approximately 45 minutes later Anglada told Nieves everything should be ready and directed them to go back. The three men left the Doll Lounge and entered Nieves' car at which time Anglada directed Nieves to drive to Spring Street and Bowery and to park the car on that street. Anglada left the car, telling Nieves that he would be right back (Tr. 49).

^{*} Nieves explained that a "five-hit" means that the heroin he was purchasing could have been cut five times—in other words the ounce he was to buy could be broken into five one-ounce packages after the original ounce was mixed with dilutants (Tr. 49).

Sometime later, Nieves walked to the corner of Elizabeth and Spring Streets where he saw Anglada and Shaw leaving a car (Tr. 49-51, 147). They walked up to Nieves who asked Anglada if everything was all right. Anglada said yes and introduced the defendant George Shaw to Nieves as the three walked back to Nieves' car, where they were met by Santana (Tr. 53, 147-148). As they entered the car, Anglada sat in the right front passenger seat. Santana sat behind Anglada and Shaw sat behind Nieves who was in the driver's seat. In the car, Anglada directed Shaw to give the "stuff" to Nieves. Shaw, after stating he had people watching the car, placed a pack of Kool cigarettes on the armrest of the front seat. Nieves took the package, opened it, and removed a manila envelope containing the heroin (GX 1) which he weighed on his scale (GX 6). After Nieves weighed the envelope he placed it back in the cigarette package and put it in his pocket. Nieves counted out \$1,000 which he gave to Anglada and \$600 which he gave to Shaw (Tr. 54-56). Nieves then asked Anglada where he could call him and Anglada responded that he would contact Santana who in turn would contact Nieves. Anglada and Shaw then left the car and met an unidentified man at the corner of Elizabeth and Spring Streets where Anglada gave Shaw the money (Tr. 56, 148-149). Nieves, having the heroin * in his possession, and Santana subsequently drove away (Tr. 57; GX 1).

On October 23, 1974, the defendant Torres telephoned Nieves and the two men briefly discussed the transaction of September 6, 1974 and largely discussed another sale for more heroin (Tr. 61; GX 7, GX 7A). A tape recording and a transcript of the taped conversation were admitted into evidence and played to the jury (Tr. 69, 136; GX 7, GX 7A).

* It was stipulated by all parties that the heroin was determined upon a chemical analysis to be 21.8% heroin hydrochloride and the balance lactose (Tr. 189-193; GX 1A).

B. The Defendants' Case

Torres presented no evidence.

Detective Arthur Drucker of the New York City Police and New York Joint Task Force was called as a witness by defendant Anglada. Drucker testified that Carlos Santana was a confidential informant assigned to him as of August 1974 (Tr. 210, 212). Drucker also testified that *after* August 1974 * Santana had a case pending against him and that in February 1975 Santana was de-activated as an informant (Tr. 215, 218).

Richard Anglada testified on his own behalf. He said that in September 1974 his fiancée, Maria Matos, had a brother, Carlos Santana (Tr. 253). In early September 1974, on the day before the sale took place, Anglada had a conversation about getting drugs with Santana which lasted for 45 minutes (Tr. 293):

"Well, Junior [Santana] was talking to me for quite a while, you know, trying to convince me to do him a favor of getting some drugs for him, and he talked and kept on saying the same things, 'will you do me the favor, will you do me the favor, please. I will come out winning at the end.' I told him, 'I don't know, Junior.' So then he kept on saying, 'Please, Richie, I really would appreciate the favor, you know, you are my sister's boyfriend, I want you to help me,' and I still told him I wasn't sure. He kept insinuating with the same thing until he convinced me, and I said, I would let him know" (Tr. 290).

* It is obvious from the record and not as counsel for Anglada states in his brief at p. 5 that Santana was arrested in November 1974 by New York State authorities on a felony charge for the sale of drugs (Tr. 219-220). Subsequently on March 4, 1975, Santana was arrested and arraigned in this Courthouse for the forgery and uttering of a government check (Tr. 220).

Anglada said that he knew Santana was addicted to drugs and that previous to this incident had given Santana money for clothes and shoes but that he knew Santana had used that money for drugs (Tr. 291-292).

Anglada testified that after the conversation with Santana on September 5, he went to George Shaw's house and told Shaw that his girlfriend's brother wanted to buy an ounce (Tr. 294). Shaw told him that whenever he wanted it Anglada could come and get it, and that it would cost \$1,600 (Tr. 294-295). The next day (September 6) Anglada told Santana that he found a friend who will do him (Anglada) the favor and sell it to Santana. Santana asked him where to meet and when Anglada responded with an "I don't know," Santana suggested Bowery and Houston at 1:00 P.M. (Tr. 296-298). Anglada said that after leaving Maria at school he went home to sleep and that he received a phone call at 1:30 p.m. from Santana, after which he went to Bowery and Houston to meet Santana and Nieves. Anglada got into the car and suggested that Nieves drive to Dave's Corner a restaurant at Broadway and Canal Street. There Anglada and Santana ate at a luncheonette while Nieves entered the Doll Lounge (Tr. 298-299, 301). Anglada claimed that he had not entered the Doll Lounge, and he denied telling Nieves in the bar that the heroin was Eddie's stuff and that it could take a five-hit or cut. Anglada also denied that Torres had told him to go to the corner of Bowery and Houston on September 4 to deliver a message.* Anglada said that after Nieves came out of the bar, Anglada directed them to drive to Spring Street and Bowery where Anglada got out of Nieves' car and walked to Shaw's apartment. There, Anglada told Shaw that his girlfriend's brother was waiting on Bowery and Spring to which Shaw replied 'Let's go' (Tr. 302-304).

* Efforts by Anglada's counsel to establish the date of a purported conversation Anglada had with Santana concerning the failure of Torres to show up at Bowery and Houston were futile (Tr. 308-310).

Anglada and Shaw joined Nieves and Santana in the undercover car where Shaw gave Nieves the package of Kool cigarettes which Nieves weighed. Nieves then counted \$1,000 and put it next to Anglada and counted \$600 and gave it to Shaw. Anglada testified that he heard a siren and that Santana said "get out of the car" at which time Anglada grabbed the money and ran out of the car. Anglada then gave the money to Shaw and went home (Tr. 304-307).

Anglada claimed that he only drinks brandy, has never used heroin and has never sold drugs, and that he only sold the heroin because Santana was his girlfriend's brother (Tr. 307-308).^{*} He denied having kept any money from the sale (Tr. 325, 332-337).

George Shaw testified on his own behalf. Shaw said he was 20 years old and addicted to heroin and that he had used other drugs. He said that he had sold and purchased heroin. Shaw said that he had met Anglada a year and a half ago in the neighborhood and the two used to get "stoned" together. He also said that on September 6, 1974, Anglada came to his apartment and said that he had some people who wanted to buy an ounce and that it was Anglada's girl's brother. Shaw testified that he measured an ounce and went with Anglada to Nieves' car where the sale took

^{*} Additionally, during the direct examination of Anglada, defense counsel attempted to introduce into evidence a tape of a telephone conversation. In November 1974, Anglada, after his arrest, and at the direction of his lawyer Mr. Taikeff, took George Shaw, who was without the benefit of counsel, to a telephone booth at which time Shaw engaged in a telephone conversation with Mr. Taikeff who simultaneously taped the conversation. Efforts by the defense to introduce into evidence the "Taikeff tape", the existence of which was known neither to the Court nor to the Government prior to trial, were unsuccessful (Tr. 254-289). The Court, and rightly so, questioned the propriety of this action, finding that the contents of the tape to be untrustworthy (Tr. 282).

place for \$1,600 (Tr. 395-406). Shaw said that upon leaving the car and while walking toward Broome Street, Anglada gave him the money and the two of them went inside an apartment on Broome Street. There, Shaw measured a spoon of heroin and gave it to Anglada together with \$100 (Tr. 407).*

ARGUMENT

POINT I

The trial court properly refused to instruct the jury on the issue of entrapment.

Anglada claims that Judge Cannella erred in refusing to submit the issue of entrapment to the jury. In denying Anglada's request for an entrapment charge, the Court ruled:

"As far as the defendant Anglada is concerned, Anglada's request for an entrapment charge is denied. He and the evidence of propensity is uncontradicted. Anglada, for whatever his reasons, readily assisted Santana's efforts to obtain heroin. He did not question the propriety of the undertaking such action, and was fully prepared to complete the transaction on the occasion when he met in the car with Junior [Santana], Nieves and Shaw.

"The evidence shows that Anglada grasped at the opportunity to deal in drugs, albeit in purported assistance of Junior [Santana], but nonetheless freely and voluntarily.

* On cross-examination by the Government, Shaw said this spoon of heroin and the \$100 was Anglada's commission for his part in the drug sale (Tr. 408). Counsel for Anglada and Torres did not cross-examine Shaw.

"Indeed, Anglada's own testimony shows that he did not hesitate to act under the circumstances. Here I believe that what is being confused is the question of motive rather than predisposition. I have discussed this aspect of it during the course of the trial with Mr. Taikoff before, and I incorporated that discussion into this ruling by reference" (Tr. 426-427).*

The Court was entirely correct in refusing to submit the issue of entrapment to the jury based on the substantial uncontradicted evidence of Anglada's predisposition and propensity to arrange the sale of heroin.

The law in this Circuit is clear that if there is sufficient evidence of initiation or inducement by a Government agent, the Government has the burden of proving that the defendant has a predisposition to commit the crime. *United States v. Sherman*, 200 F.2d 880, 882 (2d Cir. 1952) (Hand, J.); *United States v. Riley*, 363 F.2d 955 (2d Cir. 1966). Compare *United States v. Kadis*, 373 F.2d 370, 373 n. 4 (1 Cir. 1967).

The defendant who asserts an entrapment defense must present evidence that he was induced to commit the crime. *United States v. Sherman, supra*. In this case the conver-

* In denying Anglada's motion for judgment of acquittal, the Court asked Anglada's counsel, "Why isn't your client's statement on the stand here a confession of guilt, even though he didn't plead guilty? What has he said that in any way exculpates him? He has said, I made an arrangement for a deal in narcotics. I know what the price was. I went up there at the time. I was handed the money. I handed part of the money over, and for the life of me, I can't see what the defense is here" (Tr. 418). Moreover, the Court continued, "If this were a non-jury case—and it is not, I would find him guilty out of his own testimony, him alone, period, with nobody else's testimony added. I can't see how he confuses motive or you confuse motive with intention. Intention is so clear; it is crystal clear. What you are confusing is motive. His motive could not be of less importance in this case . . ." (Tr. 418-419).

sation Anglada had with the informant Santana, in which Anglada agreed to obtain a source for an ounce of heroin satisfies that burden. *United States v. Braver*, 450 F.2d 799, 802 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972); *United States v. Henry*, 417 F.2d 267, 269 (2d Cir., 1969), *cert. denied*, 397 U.S. 953 (1970). However, after inducement is shown a defendant is not entitled to a charge on entrapment unless the Government fails to present substantial uncontradicted evidence that the defendant was predisposed and was ready, willing and able to commit the offense and merely awaiting the opportunity. *United States v. Miley*, 513 F.2d 1191, 1202 (2d Cir. 1975); *United States v. Gonzalez*, 460 F.2d 1286, 1287 (2d Cir. 1972); *United States v. Nieves*, 451 F.2d 836, 838 (2d Cir. 1971); *United States v. Greenberg*, 441 F.2d 369, 372 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971); *United States v. Riley*, 363 F.2d 955, 957-959 (2d Cir. 1966).

The record below clearly presents substantial uncontradicted evidence of Anglada's propensity to commit the crime charged. On September 5, Anglada met with Santana and agreed to do Santana a favor by obtaining an ounce of heroin. Anglada claims that he agreed to do it because Santana was his fiancée's brother.* Immediately after the conversation Anglada went to see Shaw to tell him that he had a prospective buyer.** Shaw told Anglada that

* Though Anglada testified that he was engaged to Maria Matos, Santana's half-sister, during September of 1974, and persisted in this contention on cross-examination, he later stated that he knew Matos and Santana did not get along as brother and sister (Tr. 318) thus casting doubt on his purported reason for agreeing to arrange a sale. Matos testified at a post-trial hearing that she had broken off her engagement with Anglada prior to leaving for Puerto Rico in June 1974 and the engagement was never resumed (4/8/75 Tr. ~~1007~~ 8-10).

**This piece of testimony is very important because it clearly indicates that immediately after the Santana conversation Anglada, again through his own testimony, begins to look for a source of

[Footnote continued on following page]

it would cost \$1,600. On the following day, Anglada, without any hesitancy, told Santana that he had found a friend who would sell the heroin. Later that day the sale took place, orchestrated entirely by Anglada. Anglada told the undercover Agent, Nieves, that everything was all right and directed Nieves to drive to Broadway and Canal Street.* Shortly thereafter, Anglada, having said that "everything" should be ready by now, directed Nieves to drive to Spring Street and Bowery where Anglada left the car. He returned a short time later with Shaw. Again, Anglada took over: he introduced Shaw to Nieves and then sat in the front seat from where he directed Shaw to give Nieves the "stuff." Anglada then took the \$1,000 payment and left with Shaw, but only after he told Nieves that for more business Nieves should contact Santana who in turn would contact Anglada. Later, Anglada gave the \$1,000 to Shaw and in return received \$100 in cash and a spoon of heroin.** The conclusion is absolutely inescapable from this evidence that Anglada, Santana and Shaw were part of a conspiracy to sell heroin before Anglada met Nieves, and that on September 6 he was ready, willing and predisposed to sell heroin to Nieves.

Obviously, as Judge Cannella found at trial, Anglada has confused the requirement of proof of propensity to commit a crime with the requirement of proof of criminal

heroin. There was no testimony from Anglada at this point that after he spoke to Santana he, Anglada, reneged or had any doubts as to what he would do. By his unilateral unpressured act Anglada showed he was ready and willing to commit the crime. Anglada, argues however, that the pressure he did encounter was when Santana asked him to do a "favor" by obtaining some heroin. Exactly how "asking for a favor" creates any type of "pressure" is, not surprisingly, undisclosed by the appellant either by explanation or citation.

* Additionally, there was not a scintilla of evidence that either Nieves or Santana exerted any pressure upon Anglada to enter the car.

** Anglada never cross-examined Shaw with respect to Anglada's acceptance of his commission.

intent as a distinct and necessary element of the crime itself. The issue of intent was submitted to the jury with proper instructions (Tr. 538-540), and the jury quite properly determined that Anglada had the requisite intent, regardless of his professed motive of fraternal favor. In light of the overwhelming and uncontradicted evidence of Anglada's predisposition, there was nothing to support the defendant's request for an entrapment charge except the "semantic contentions of counsel," *United States v. Miley, supra*, at 1202, and that is clearly inadequate.

POINT II

The trial court correctly permitted the informant Santana to invoke his Fifth Amendment privilege.

Anglada argues that the Court's decision to permit Santana, the informant, to assert the Fifth Amendment privilege at trial was error. Anglada claims that Santana's speaking to the Government prior to trial constituted a waiver of his Fifth Amendment privilege and that the Court's failure to direct Santana to testify precluded Anglada from developing an entrapment defense which would have resulted in a mandatory situation for the Court to give an entrapment charge to the jury. These contentions are totally without merit.

Prior to the commencement of trial, at Anglada's request, the Government produced the informant, Carlos Santana, for an interview with defense counsel. Santana refused to speak with Mr. Taikoff. Prior to this meeting, Santana was interviewed by Government representatives. At a pre-trial conference on March 21, 1975 Judge Cannella, ruling on a motion by Anglada, refused to inquire of Santana the reasons why he decided not to speak to the defense.*

* Additionally, in this conference the Government advised the Court that Santana had been threatened (3/21/75 Tr. 22).

When Anglada called Detective Drucker to testify at trial, defense counsel developed a line of questioning attacking Santana's credibility and character (Tr. 210-221).^{*} Santana was then questioned by the Court outside the presence of the jury. He advised Judge Cannella that upon advice of counsel he would assert his Fifth Amendment privilege and refuse to answer questions (Tr. 226-237). The reason for asserting the Fifth Amendment privilege was based upon the fact that Santana had a New York State "A felony" drug charge^{**} pending against him and that any statement he would make may be used against him in the state proceeding absent any immunity (Tr. 231-233). Therefore, Santana had every right to refuse to testify in light of the pending state charge against him and Judge Cannella properly excused him without requiring any questions to be put.^{***}

The Court committed no error in excusing Santana. The law is well established in this Circuit that the privilege against self-incrimination includes the right against self-incrimination under state penal laws. *United States v. Domenech*, 476 F.2d 1229, 1231 (2d Cir.), *cert. denied*.

^{*} At the side bar, Anglada's counsel stated that he wanted to call Santana as a witness and was prepared to question him as a hostile witness (Tr. 221-222). The Government advised the Court that Santana had not been called as a witness in its direct case because Santana was prepared to invoke his Fifth Amendment privilege (Tr. 223).

^{**} This charge is the Santana arrest of November 1974 which both Anglada and the Government stipulated to with respect to the date (Tr. 219-220). Prior to September 1974 Santana, and specifically in August 1974, Santana had no outstanding arrests, a fact which Anglada misstates in his brief (Br. 21). Santana's other arrest occurred on March 4, 1975 when he was arraigned in this Courthouse on a forgery violation (Tr. 220). Thus, Anglada's argument that Santana "was trying to work off a bust" because he solicited Anglada while Santana was facing charges is completely in error.

^{***} Judge Cannella informed the jury of Santana's unavailability to both sides since he decided to invoke his Fifth Amendment privilege (Tr. 237).

414 U.S. 840 (1973); *United States v. Llanes*, 398 F.2d 880, 884-885 (2d Cir. 1968), *cert. denied*, 393 U.S. 1032 (1969); *United States v. Chandler*, 380 F.2d 993, 997 (2d Cir. 1967). See also, *Kastigar v. United States*, 406 U.S. 441, 456-457 (1972).

The *Llanes* decision is particularly instructive. In affirming the District Court's decision not to grant an entrapment charge after a severed co-defendant refused to testify as a defense witness, the Court of Appeals stated, "the fact that Pino who was called as a witness by the appellant, might have given evidence from which entrapment could be inferred, if he had not relied upon his Fifth Amendment privilege . . . does not lead us to reach a different result; such speculation is no substitute for evidence in the record and the judge was not required to charge on the issue." *United States v. Llanes*, *supra*, at 884. Moreover, the Court took note of the fact that Pino was under indictment for a narcotics violation and reasoned that "an answer to any of the questions propounded might have opened a line of inquiry which would eventually furnish a link in the chain of evidence to be developed in the impending prosecution of Pino." *Id.*, at 885.

In the instant case, as in *Llanes*, the witness Santana was facing state charges, and it is more than conceivable that had he testified with respect to his involvement in the September transaction those answers would have opened a line of inquiry which in likelihood would have established a link to his own involvement with other drug transactions.* Clearly, therefore, Santana had a legal basis to exercise his privilege to protect himself as to any statements he might have made concerning this drug transaction—statements which could very well be used against him in a state proceeding.

* It should be noted that in Drucker and Anglada's testimony defense counsel had embarked on this line of inquiry to discredit Santana's character based upon his prior and post-September 1974 drug activity (Tr. 210-220, 291-293).

In any event, the Government contends that the Court need not reach that issue. Even assuming Santana had been required to testify it is obvious from the record that Santana would not have provided any testimony which would have supported an entrapment defense. Even the defendant Anglada's testimony indicated only that Santana had asked him to do a "favor." There is no claim or proof that Santana "forced" or "pressured" him to do anything with respect to this sale; thus, Santana could not possibly have added any new elements of pressure which directly affected or negated Anglada's admitted propensity to commit the crime. Significantly, Anglada's counsel never submitted an offer of proof to the Court on how Santana's testimony would show the "pressure" Santana exerted on the defendant, nor was it ever developed in Anglada's direct testimony. The elusive element of the "Santana pressure," which the evidence shows did not exist, was neither claimed nor developed nor testified to by Anglada at trial. Certainly, had such "pressure" existed Anglada would have brought it out in his testimony. This he glaringly failed to do. Absent any showing of pressure, direct or indirect, Santana's testimony would not have helped Anglada's development of an entrapment defense, especially in light of the overwhelming and uncontroverted evidence of Anglada's propensity to commit the crime. Accordingly, the Court properly refused to direct Santana to testify after he asserted his Fifth Amendment privilege.

POINT III

The trial court properly instructed the jury regarding reasonable doubt.

Anglada attacks Judge Cannella's instruction on reasonable doubt, claiming it was incomprehensible and legally wrong. The attack is unfounded and there was no error of any kind requiring reversal.

The trial court's instruction on reasonable doubt was clear, accurate and permissible in all respects:

"What do we mean by reasonable doubt? A reasonable doubt that is based upon reason and must be a substantial rather than speculative doubt. It must be sufficient to cause a reasonably prudent person to hesitate to act in the more important phases of his life" (Tr. 525).

In fact, this charge, which uses the conventional form for reasonable doubt approved in this Circuit, almost verbatim follows the reasonable doubt instruction approved in *United States v. Heap*, 345 F.2d 170, 171 (2d Cir. 1965). See also, *Holland v. United States*, 348 U.S. 121, 140 (1954).

It should be noted also that Anglada failed to request a specific charge on reasonable doubt. Moreover, contrary to Anglada's claims on appeal (Br. 24) the record clearly shows that Anglada never objected to the trial court's instruction on reasonable doubt.* Accordingly, he is pre-

* At the close of the Court's charge defense counsel stated their objections on the record. At no time did any defense counsel voice an objection to the reasonable doubt charge of Judge Cannella (Tr. 548-553). Appellant mistakenly asserts that he objected to the reasonable doubt charge on page 553 (Br. 24). There, it was Mr. Holtzman, counsel for Torres, who objected to the Court's use of a "twig analogy" in describing how the jury can use circumstantial evidence in arriving at their verdict.

cluded from seeking a review of the reasonable doubt instruction which clearly was correct in any event. *United States v. Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd.*, 402 U.S. 146 (1971); *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

FEDERICO E. VIRELLA, JR.,
T. BARRY KINGHAM,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

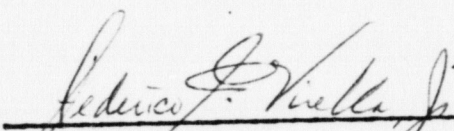
ss.:

FEDERICO E. VIRELLA, JR., being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 27th day of August, 1975,
he served 2 copies of the within brief by placing the same
in a properly postpaid franked envelope addressed:

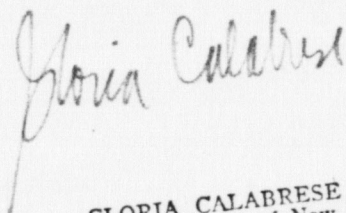
Elliot A. Taikeff, Esq.
Attorney at Law
335 Broadway
New York, New York 10013

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.


FEDERICO E. VIRELLA, JR.

Sworn to before me this

27th day of August, 1975



GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977